

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

February 11, 2003

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IN RE: Petition to Suspend BellSouth's)
 "Welcoming Reward" Tariff and)
 Open a Contested Case Proceeding)

TN REGULATORY AUTHORITY
DOCKET ROOM
Docket No. 03-00060

**REPLY OF THE CLEC COALITION IN SUPPORT OF OPENING A CONTESTED
CASE PROCEEDING**

The CLEC Coalition¹ submits this Reply brief in support of the Coalition's request that the Tennessee Regulatory Authority open a contested case proceeding to consider BellSouth's "Welcoming Reward" tariff.

On January 22, 2003, the Coalition filed the above-captioned Petition asking that the Authority suspend the tariff and open a contested case proceeding. BellSouth filed a Response to the Petition on the afternoon of January 31, 2003, the Friday before the agency's February 3, 2003 agenda conference, effectively leaving the Coalition no time to reply to BellSouth's arguments. On February 3, the Authority voted not to suspend the proposed tariff but postponed until February 18 a decision on whether or not to open a contested case proceeding. Given this opportunity, the Coalition therefore files this Reply which responds to BellSouth's arguments regarding the Coalition's request to open a contested case proceeding.

Argument

BellSouth's Welcoming Reward tariff raises, among other issues, at least two, significant regulatory questions which the TRA has never addressed:

¹ At this time, the Coalition includes Access Integrated Networks, Inc., Cinergy Communications Company, Xspedius Corporation, and AT&T Communications of the South Central State, Inc.

1. May BellSouth discriminate between two customers who are "similarly situated" in all relevant respects, including access to competitive carriers, solely on the grounds that one is a new customer and the other an existing customer?
2. May BellSouth offer retail service at a rate which is less than BellSouth's wholesale rate for the same service?

It is not the purpose of this reply to fully brief all the legal and policy issues raised by BellSouth's filing but rather to point out this tariff is no ordinary promotion. To the contrary, the tariff has serious and unprecedented implications regarding discrimination among customers and the development of a competitive market. The Coalition respectfully suggests that it is the purpose -- if not the duty -- of this agency to consider these implications in a contested case proceeding.

1. Discrimination

If BellSouth submitted a tariff promising new customers better and faster repair service than existing customers, such a tariff would clearly be "discriminatory" and an "undue preference" in violation of state law and federal law. *See, e.g.*, T.C.A. § 65-4-122. Similarly, offering new customers a cheaper price -- for no reason other than the fact the customer is new -- seems patently illegal. The Tennessee statutes prohibiting discrimination and preferences are more than a century old and have been interpreted dozens of times. Those laws are copied from similar federal statutes which also have been applied and interpreted in hundreds of cases. The case law describes preferences that are acceptable and reasonable and preferences that are improper. In all that case law, the Coalition is unaware of a single case, and BellSouth has yet to point to one, in which a court has held that a common carrier may discriminate in price or service between two otherwise identical subscribers simply because one is a new customer and the other an existing customer.

Even BellSouth, which promises to make every contract service arrangement (CSA) available to any "similarly situated customer" defines "similarly situated" as any customer whose "quantity of use and time of use and [whose] manner and cost of service are the same." See BellSouth's Statement of Generally Available Terms ("SGAT") at p. 27. Thus, BellSouth does not distinguish between new and existing customers when making CSAs available to other, similarly situated users.

This agency has recognized that an incumbent carrier may offer a reduced rate (as long as it is above cost) if necessary in order to meet a competitor's offer. But the agency has never held that an incumbent may discriminate between identical customers with identical competitive choices simply on the grounds that one is new and the other is not. Such an exception to the statutory prohibitions against discrimination and preferences would render those statutes largely useless. BellSouth could refuse to offer a CSA to another similarly situated customer for no reason except that the other customer is already a BellSouth subscriber. Other state commissions have found this practice discriminatory and illegal.² This Authority has previously expressed concerns over tariffs, such as this one, which are aimed at "winning back" CLEC customers, but the agency has never directly ruled on whether such tariffs are appropriate in Tennessee. It is time to do so now.

2. Resale

Federal law and BellSouth's own state tariffs (BellSouth's SGAT) require the carrier to offer this tariff to resellers at a discounted, wholesale rate.

² The Kentucky Commission, for example, recently found that BellSouth had wrongfully refused to make available to an existing BellSouth customer the same terms and conditions BellSouth had previously offered to win the business of a new, but otherwise similar, subscriber. "*SPIS.NET v. BellSouth*," Case No. 2001-00099. Order issued December 19, 2002.

Under the tariff, BellSouth pays a \$100-a-line bonus to any "new" small business customer who agrees to sign a twelve-month service contract. Although BellSouth contends that the tariff is available for resale, it is not clear from the language of the tariff whether, or under what circumstances, BellSouth would pass on the \$100-a-line bonus to resellers. In oral argument during the agency's February 3 conference, however, BellSouth made clear its position that the bonuses are not available to resellers under any circumstances. BellSouth's refusal to make available the \$100-a-line bonus to resellers not only violates BellSouth's resale obligations as spelled in the carrier's SGAT,³ but it also creates an illegal "price squeeze" which is expressly prohibited by state law. T.C.A. § 65-4-208(c).

"Price squeezing" occurs when a public utility's wholesale rate is so high, and its retail rate so low, as to "squeeze" the ability of other retailers to compete.⁴ Because BellSouth refuses to pass on the \$100-a-line bonus to resellers, BellSouth's wholesale price is actually higher than BellSouth's retail price for the same service.

Under the tariff, a qualifying customer receives a \$100-a-month bonus for each line and, over the next twelve months, pays the regular retail rate of \$39.70 a month for each line. Thus,

³ Because the tariff requires customers to sign twelve-month contracts in order to receive the \$100-a-line bonus, the TRA has ruled that this tariff should be considered a long term – not a short term – promotion. See "In Re: BellSouth Telecommunications, Inc.'s Tariff to Offer a Special Promotion for Business Customers Subscribing to Exchange Lines with Hunting", Docket 99-00936, Order Denying Tariff, November 7, 2000. Under the terms of BellSouth's SGAT, as recently amended and approved by the TRA on February 3, 2003, BellSouth must make long term promotions available for resale at the promotional rate, less the wholesale discount. This presumably requires BellSouth to offer a reseller both the \$100-a-line bonus (the promotional rate), and the 16% wholesale discount.

⁴ "A 'price squeeze' occurs when a wholesale supplier, who also sells at retail, charges such high rates to its wholesale customers that they cannot compete with the supplier's retail rate." *Illinois Cities of Bethany v. Federal Energy Regulatory Comm.*, 670 F.2d 187, n4 (D.C. Cir. 1981).

over the contract service period, the actual retail price is \$31.37 a month or \$376.40 for the length of the contract.

A CLEC may also purchase service under the tariff at a discounted, wholesale rate and resell the service to an end-user. BellSouth, however, has stated that it will not pay the \$100-a-line bonus to a wholesaler. Thus, a CLEC purchasing wholesale service under this tariff would pay \$33.35 per month (\$39.70 less the 16% wholesale discount) or \$400.20 for the twelve month service period.

In other words, this tariff authorizes BellSouth to offer twelve months of service at a retail rate of \$376.40 while charging a wholesale price of \$400.20 for the same service over the same period.

If this is not a "price squeeze," the term has no meaning. BellSouth has effectively eliminated the wholesale discount and made it impossible for a reseller to compete. The General Assembly has directed the Authority "to adopt other rules or issue orders to prohibit . . . price squeezing . . . or other anti-competitive practices." T.C.A. § 65-5-208(c). Clearly, the Authority must take action to prohibit this blatantly illegal pricing scheme.

Conclusion

As stated earlier, it is not the purpose of this short reply to fully brief all of the issues raised by BellSouth's tariff. This is not a proceeding on the merits of the tariff but an urgent request by the Coalition that the agency initiate a contested case proceeding to consider the legal and policy issues raised by the tariff. Now that the tariff is in effect, the issue of whether to suspend the tariff is moot, but the issues of discrimination and price squeezing, among others, will not be resolved until the agency exercises its statutory responsibility to address them.

Respectfully submitted,

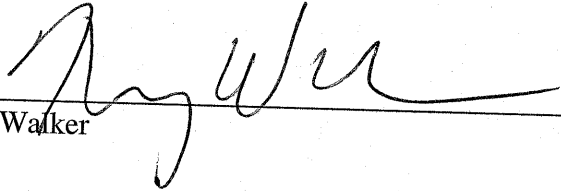
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 15 day of February, 2003.

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